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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1970

No. [redacted] 83

GARRETT H. BYRNE, as he is the duly elected District Attorney for Suffolk County, City of Boston, Commonwealth of Massachusetts, and ROBERT H. QUINN, Attorney General of the Commonwealth of Massachusetts,

APPELLANTS,

v.

SERAFIM KARALEXIS, JAMES VLAMOS, SYMPHONY CINEMA II, INC., and FILM DISTRIBUTORS, INC., all of 252 Huntington Avenue, Boston, Massachusetts;

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE APPELLANTS

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In the

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No. 1149

GARRETT H. BYRNE, as he is the duly elected District Attorney for Suffolk County, City of Boston, Commonwealth of Massachusetts, and ROBERT H. QUINN, Attorney General of the Commonwealth of Massachusetts,

APPELLANTS,

v.

SERAFIM KARALEXIS, JAMES VLAMOS, SYMPHONY CINEMA II, INC., and FILM DISTRIBUTORS, INC., all of 252 Huntington Avenue, Boston, Massachusetts,

APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE APPELLANTS

Opinion Below

The opinion of the United States District Court for the District of Massachusetts (App. 31-43) is reported at 306 F. Supp. 1363.

Jurisdiction

The judgment and opinion of the United States District Court for the District of Massachusetts authorizing the issuance of a preliminary injunction was entered on November 28, 1969. The preliminary injunction was issued on December 6, 1969. A timely Supplemental Notice of Appeal was filed on December 24, 1969, and a Jurisdictional Statement was filed with the Clerk of this Court on February 4, 1970. This Court noted probable jurisdiction on March 23, 1970. Jurisdiction is invoked under 28 U.S.C. 1253.

Questions Presented

1. Whether a state may, consistent with First Amendment considerations, prohibit commercial distribution of obscene and pornographic material.

2. Whether, in the circumstances of this case, the court below abused its discretion in issuing a preliminary injunction enjoining enforcement of a state law prohibiting commercial distribution of obscene and pornographic material.

Statute Involved

Mass. Gen. Laws, ch. 272, §28A, provides:

> Whoever imports, prints, publishes, sells or distributes a pamphlet, ballad, printed paper, phonographic record, or other thing which is obscene, indecent or impure, or an obscene, indecent or impure print, picture, figure, image or description, or buys, procures, receives or has in his possession any such pamphlet, ballad, printed paper, phonographic record, obscene, indecent or impure print, picture, figure, image or other thing, for the purpose of sale, exhibi-

tion, loan or circulation, shall be punished by imprisonment in the state prison for not more than five years or in a jail or house of correction for not more than two and one half years, or by a fine of not less than one hundred dollars nor more than five thousand dollars, or by both such fine and imprisonment in jail or the house of correction.

Statement

On June 3, 1969, the appellees were indicted by the Suffolk County Grand Jury of possessing with intent to exhibit, and exhibiting, an obscene film—"I Am Curious (Yellow)"—in violation of Mass. Gen. Laws, ch. 272, §§28A and 32, respectively. On or about June 17, 1969, appellees filed an Amended Complaint,[1] and Amendments to that Amended Complaint, in the United States District Court for the District of Massachusetts seeking, *inter alia*, to enjoin future prosecutions of the film, and to declare prosecutions in connection with the showing of that film and the statutes (Mass. Gen. Laws, ch. 272, §§28A, 32) unconstitutional on their face (App. 15-20, 24-28).[2] On June 24, 1969, a three-judge district court temporarily enjoined the prosecution on the ground that the indictments did not allege *scienter* (App. 21-23). On June 25, 1969, the Suffolk County Superior Court, with the assent of the district attorney Garrett H. Byrne, dismissed the indictments. On or about June 30, 1969, appellees filed an amendment to their Amended Complaint in which they alleged that they had sufficient cause to believe that new indictments would be returned, and re-

[1] The original Complaint (App. 6-13) was withdrawn by appellees prior to the filing of a response by appellant, Garrett H. Byrne.

[2] Jurisdiction was invoked under the provisions of the Civil Rights Act (42 U.S.C. 1983) and the Declaratory Judgment Act (28 U.S.C. 2201).

newed their request that appellant Garrett H. Byrne be enjoined from prosecuting in connection with the showing of the film (App. 25-28). Thereafter, the Suffolk County Grand Jury returned new indictments charging all appellees with possessing, with intent to exhibit, obscene matters—the film, "I Am Curious (Yellow)"—in violation of Mass. Gen. Laws, ch. 272, §28A. On July 15, 1969, the court below, after a hearing, denied the renewed request for a preliminary injunction, stating (App. 29):

> The motion for a temporary injunction is denied at this time, subject to renewal if and when petitioner is convicted in the Superior Court. If petitioner is convicted and the prosecution offers to renew the present stipulation, that no seizure of the film or interruption with the showing will be made, the motion for injunction shall not be renewed until a motion for judgment n.o.v. shall be heard and determined against petitioner, or for 30 days after verdict, whichever shall first occur.

On November 12, 1969, the appellees were convicted in the Suffolk County Superior Court.[3] At the present time, exhibition of the film has been discontinued, and appellants have not agreed that appellees may exhibit the film pending pursuit and completion of state appellate remedies.

On or about November 19, 1969, appellant Garrett H. Byrne moved the court below to abstain from granting the relief sought in the Complaint pending resolution of the issues raised therein by the Massachusetts Supreme Judicial Court (App. 30). On November 28, 1969, after further argument, the court below, one judge dissenting, denied the motion for abstention, and ordered the issuance of a preliminary injunction enjoining future prosecutions in

[3] Appeals from those convictions are presently pending.

connection with the showing of the film (App. 31-43). On December 6, 1969, the court below issued the injunction (App. 44-45), but stayed its effect pending disposition of an application for a stay by this Court pursuant to Rules 18, 50, and 51, of the Rules of this Court (App. 46). On the same date, Robert H. Quinn, Attorney General of the Commonwealth of Massachusetts, was ordered added as a party defendant without objection (App. 44). On December 15, 1969, this Court stayed the effect of the preliminary injunction issued by the court below pending the filing and disposition of a Jurisdictional Statement (App. 46-52). A notice of appeal was filed on December 24, 1969 (App. 52-53). The jurisdictional Statement was filed on February 4, 1970. On March 23, 1970, this Court denied a motion to vacate the stay previously entered, and noted probable jurisdiction (App. 53).

Summary of Argument

I.

A. The majority of the court below held that First Amendment considerations invalidate statutes prohibiting commercial distribution of obscene and pornographic material *per se*—that enforcement against commercial distribution of obscene and pornographic material is proper only where there has been a showing of distribution to minors, pandering, or distribution in a manner offensive to those who are not willing to view such material. The majority further ruled that a state statute which prohibited commercial distribution of obscene and pornographic material without regard to the manner of distribution was unconstitutionally overbroad, and thus, facially invalid.

In so ruling, the majority below erred in its evaluation of relevant history and precedent of this Court. Relevant

history amply shows that the Founding Fathers never intended obscenity and pornography to be protected by the free speech or free press provisions of the First Amendment. Indeed, a majority of this Court, less than two decades ago, unequivocally declared that commercial distribution of obscenity and pornography was never intended to enjoy First Amendment protection. *Roth* v. *United States*, 354 U.S. 476. Nothing of consequence has emerged within the last two decades tending to show that the majority in *Roth* erred in its assessment of the relevant history pertaining to the adoption of the First Amendment, and this Court has consistently, since *Roth*, held that commercial distribution of obscenity and pornography does not enjoy First Amendment protection.

B. In any event, even if it can fairly be said that commercial distribution of obscenity and pornography falls within the penumbra of the First Amendment, the protection afforded that activity—like all other speech—is not absolute. In delimiting the scope and extent of protection accorded that activity, this Court should balance the legislative purpose served by legislation prohibiting it against whatever interests may be asserted by the commercial pornographer and those whom he purports to serve. The relevant history surrounding the adoption of the First Amendment, and precedent of this Court, shows that use of a "clear and present danger" test is particularly inappropriate to obscenity matters.

The legislative purpose served by legislation prohibiting commercial distribution of obscenity and pornography is dual in scope. Such legislation is directed towards protecting the public welfare, and the public morality.

With respect to the public welfare, the legislatures of the several states, have, after viewing the relevant and conflicting empirical evidence, reasonably concluded that there exists a substantial possibility visual access to ob-

scene and pornographic stimuli may induce crimes of violence and sex crimes. That conclusion is entirely reasonable at this point of time and learning—especially in view of the fact that the President's Commission on Obscenity and Pornography is presently making an endeavor to develop meaningful studies and empirical data with respect to this vital matter.

The legislatures of the several states have also concluded that commercial distribution of obscenity and pornography could result in a complete breakdown of the moral fabric of our society, which, in turn, would be extremely detrimental to the preservation of a just and ordered society. This conclusion finds ample support in history and experience, and it is beyond dispute that states retain the constitutional power to legislate with respect to matters touching purely moral judgments.

This clear legislative purpose, on balance, clearly outweighs any countervailing considerations which conceivably could be asserted by the commercial pornographer or by those whom he purports to serve. At best, he asserts only the privilege to distribute material which—as previously recognized by this Court—is utterly without redeeming social value. A proper balance clearly shows that the risk to the public welfare and public morality, by permitting commercial distribution of obscenity and pornography, is too great a one to be classified as subservient to the commerical pornographer's pecuniary desire to sell, at a profit, material which is utterly without redeeming social value.

C. A holding by this Court that prohibition of commercial distribution of obscenity and pornography is consistent with First Amendment considerations presents no conflict with the rationale of this Court's decision in *Stanley* v. *Georgia*, 394 U.S. 557. That case properly recognized that a man's library should be private, and governmental invasion of that privacy is warranted only upon a showing

of the most compelling countervailing reasons. This Court further recognized in that case that a statute which authorized punishment for private possession of obscene material necessarily encouraged—indeed, invited—lawless invasions of that constitutional right of privacy. In this regard, *Stanley* is fully consistent with the many decisions of this Court condemning the use of a "general" warrant, and "rummaging" under a special warrant. That case is also fully consistent with this Court's holding in *Griswold v. Connecticut*, 381 U.S. 479. In that case, the birth control statute there in issue, like the statute in issue in *Stanley*, necessarily invited, as a means of enforcement, governmental excursions into the privacies of the marital relationship—indeed, the marital bedroom—and was thus condemned. No issue arises with respect to a constitutional right of privacy in the enforcement of a statute prohibiting commercial distribution of obscene and pornographic material.

II.

A. The majority of the Court below, holding that the Massachusetts statute prohibiting commercial distribution of obscenity and pornography was "probably" unconstitutional on its face in the wake of *Stanley*, enjoined appellant Garrett H. Bryne, District Attorney for Suffolk County, from initiating any prosecutions with respect to the showing of the film, "I Am Curious (Yellow)." A majority of the court below ordered the issuance of an injunction despite the fact that no challenge was made to appellant's good faith in prosecuting, the fact that the Massachusetts Superior Court had found—and the court below assumed—the film obscene in the constitutional sense, and the fact that the Massachusetts Supreme Judi-

cial Court had not yet passed upon the validity of the statute in light of the *Stanley* decision.

In our view, the majority below erred in concluding that there was a showing of irreparable injury which, on balance, warranted the issuance of the extraordinary remedy of injunctive relief which had the effect of enjoining good-faith administration of state criminal laws. This Court has unequivocally held that such federal injunctive relief should issue only upon a most compelling showing of irreparable injury. *Douglas v. City of Jeanette*, 319 U.S. 157. This Court's holding in *Dombrowski v. Pfister*, 380 U.S. 479, is inapposite to this case. In *Dombrowski*, the statutes under challenge were *patently* unconstitutional on their face. The Massachusetts statute cannot fairly be characterized as *patently* unconstitutional on its face; indeed, even the majority below ruled only that it was *probably* unconstitutional on its face.

The record fails to support the finding that the threat of prosecution would cause an irreparable monetary loss. No evidence was offered on this matter, and it is not a matter of judicial notice. Appellees were not the owners of the film. Nor does the record establish a "chilling effect" on the rights of others. Thus, the court erred in concluding that the record showed irreparable injury

B. In any event, the court below should have abstained pending appeal by appellees from their state court convictions. The Massachusetts statute under challenge is fairly susceptible to a constitutional construction—even if *Stanley* extends to the point suggested by the majority—and the Massachusetts Supreme Judicial Court has, in the past, shown its willingness to construe state statutes consistent with emerging First Amendment doctrine.

Nothing in this Court's decisions in *Zwickler v. Koota*, 389 U.S. 241, and *Dombrowski v. Pfister*, 380 U.S. 479, indicates that abstention would have been improper. In

Zwickler, the statute under challenge was not susceptible to further construction. And in *Dombrowski*, the statutes under challenge were *patently* unconstitutional on their face, and could not have been construed in a single state proceeding. Moreover, in *Dombrowski*, it was alleged that prosecutions were threatened in bad faith simply for the purpose of discouraging protected activities. In the present case, no challenge was made—and, indeed, no challenge could be made—to the good faith of the prosecutor. Moreover, in the present case, the statute under challenge clearly is not *patently* unconstitutional on its face. Finally, the issues which appellees raised in the court below could be fully resolved on their appeal from the state court convictions. Indeed, those issues could have been fully resolved in a single *civil* proceeding in the state courts, had appellees so desired.

Argument

I. A State May Properly Prohibit Commercial Distribution of Obscene Material.

A. *Introduction.*

In *Roth* v. *United States*, 354 U.S. 476, and cases following it [with the possible exception of *Stanley* v. *Georgia*, 394 U.S. 557], a majority of this Court has consistently held and shared the view that a state may, wholly consistent with the First Amendment, prohibit the commercial distribution of obscene material. The rationale underlying those decisions was not that the interest of the state in barring traffic in obscenity was paramount to that of the trafficker, but simply the proposition that obscenity *qua* obscenity was never intended to enjoy First Amendment protection. In *Stanley* v. *Georgia*, 394 U.S. 557 [a case which we discuss in greater detail *infra*, pp. 26-29], a majority of this Court ruled—or at least intimated—that

First Amendment protection would extend to the possession of obscene material within the privacy of one's home. In so ruling, however, the Court did not purport to overrule the underpinnings of the *Roth* rationale—at least to the extent that *Roth* was applicable to commercial distribution of obscene material.

A majority of the court below, in an attempted reconciliation of *Stanley* and *Roth*, ruled (1) that obscenity *qua* obscenity falls within the penumbra of the First Amendment (2) that commercial distribution of obscene material may be *regulated*, but never completely *prohibited*; and (3) that the only proper legislation touching the area of commercial distribution and exhibition of obscene *films* is legislation protecting minors, preventing the exposure of such material to an otherwise non-consenting monitor, or which excluded pandering as a means of advertisement.[4]

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[4] We note at the outset that a majority of the court below has concluded—and appellees apparently have conceded—that the state can, consistent with First Amendment considerations, prohibit pandering of obscene materials. This holding and concession, however, appears to be diametrically inconsistent with the broader principle that the court below adopted —i.e., that even obscene material is protected by the First Amendment. In *Ginzburg* v. *United States*, 383 U.S. 463, a case which the court below and appellees apparently embrace as fully consistent with their broader views, a majority of this Court ruled that the manner of distribution—i.e., pandering—is relevant to a determination of the obscenity *vel non* of the challenged material. See also, *Mishkin* v. *New York*, 388 U.S. 502, 511. As we read the opinion in that case, this Court did not purport to rule that pandering *qua* pandering was a crime. But see, *People* v. *Noruff*, 63 Cal. Rept. 575, 433 P.2d 479 (1967). The petitioner in that case was charged with mailing obscene matter in violation of 18 U.S.C. 1461. Although, we suppose, "pandering" could be classified as a crime in the nature of fraud, if the touted materials did not live up to their description, the simple fact of the matter is that the petitioner in *Ginzburg* was not charged with fraud. He was charged with mailing obscene material in violation of 18 U.S.C. 1461, and the holding in the *Ginzburg* case—simply an evidentiary holding in the posture presented—is fully consistent with our view that commercial distribution of obscene material does not enjoy First Amendment protection.

In our view, the majority of the court below erred in its hypothesis and conclusion. As we point out below, obscenity *qua* obscenity was never intended to enjoy First Amendment protection. Alternatively, we argue, even if commercial distribution of obscenity falls within the shroud of the First Amendment, paramount interests of the state in providing for the public welfare and morality of its citizens far outweigh the social value supposedly inherent in obscene material, and thus, that the state can, consistent with that Amendment, prohibit the exhibition of obscene films for those consenting adults who are otherwise willing to pay the admission price. Finally, we point out that a holding that the state may properly prohibit commercial distribution of obscene material presents no conflict with this Court's holding in *Stanley v. Georgia*, 394 U.S. 557.

B. *Obscenity is Not Protected Speech Under the First Amendment to the United States Constitution.*

In determining whether or not obscenity enjoys First Amendment protection, the starting point must be that Amendment itself, and the controlling intent and purpose behind its adoption and ratification. We are unaware of any mention of the question of obscenity *vis a vis* that Amendment during the extensive debates leading to its adoption and ratification. We must therefore turn to other known evidence which might have a bearing on controlling intent.

As has been much more extensively pointed out to this Court on another occasion,[5] the relevant evidence shows that the community which authorized and adopted the free speech provision of the First Amendment did not consider

[5] Brief for the United States, *Roth v. United States*, No. 582, O.T. 1956, pp. 21-28.

obscenity and profanity to be on the same plane as communication of social or political ideas. As early as 1711, well before adoption and ratification of the First Amendment, the Commonwealth of Massachusetts had a statute in force punishing obscene publications.[6] Similar statutes were enacted by Connecticut in 1834,[7] and New Hampshire in 1842.[8] In 1811, within a decade of the adoption of that Amendment, and while the nation still remembered its grave implications, one court—in recognizing the relationship between profanity and obscenity—was quick to remark (*The People* v. *Ruggles*, 8 Johns [N.Y.] 290, 294-295 (1811):

> Things which corrupt moral sentiment, as obscene actions, prints, and writing, and even gross instances of seduction have, upon the same principle, been held indictable; * * *.

In 1815, the commercial showing of an obscene painting was ruled indictable, *The Commonwealth* v. *Sharpless, et al.*, 2 S. and R. (Pa.) 91, as was the publication of an obscene book in 1821, *Commonwealth* v. *Holmes*, 17 Mass. 335 (1821),[9] at a time when the constitutions of both the Commonwealth of Pennsylvania and Commonwealth of Massachusetts specifically guaranteed the right to a free press.[10]

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[6] Volume I, Acts and Resolves of Massachusetts Bay (1692-1714), Section 19, p. 682.

[7] Connecticut Revised Statutes (1849), §§ 135-136.

[8] Revised Statutes of New Hampshire (1842), c. 113, § 2, p. 221.

[9] The book involved in the *Holmes* case was "Memoirs of a Woman of Pleasure"—the same book subsequently found not obscene by this Court in *Memoirs* v. *Massachusetts*, 383 U.S. 413. This turn of events, however, does not indicate that obscenity is protected speech, but only that contemporary community standards may change with the passing of time.

[10] Article 12, Constitution of Pennsylvania (1776); Article XVI, Constitution of Massachusetts (1780).

This indicia which history has recorded—we suggest—clearly indicates that the community which envisioned and made the First Amendment a reality never intended obscenity to be protected speech. More importantly, however, this evidence of intent and purpose was sufficient to prompt five Justices of this Court to unequivocally conclude (*Roth* v. *United States* 354 U.S. 476, 483-485):

> At the time of the adoption of the First Amendment, obscenity law was not fully developed as libel law, but there is sufficiently contemporaneous evidence to show that obscenity, too, was outside the protection intended for speech and press (Footnote omitted).
>
> * * * *
>
> All ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. (Footnote omitted).
>
> * * * *
>
> We hold that obscenity is not within the area of constitutionally protected free speech or press.

Nothing of consequence has changed in the past decade or so since the decision in *Roth*. To be sure, relevant tastes and contemporary community standards have shifted, as is clearly reflected in the numerous *per curiam* opinions of this Court indicating that which is, and which is not, obscene. This shift in community standards, however, has no bearing whatsoever on the historical point of fact that

obscenity *qua* obscenity does not fall within the First Amendment guarantee.

In these circumstances—since commercial distribution of obscenity enjoys no First Amendment protection—a state may properly regulate and prohibit that activity. *Roth* v. *United States*, 354 U.S. 476.

C. Even if Obscenity is Speech Which Falls Within the broad reach of the First Amendment, that Amendment is Not Absolute, and the State May Properly Prohibit Commercial Distribution of Obscenity Consistent With That Amendment.

If we are wrong in our position that obscenity *qua* obscenity does not enjoy First Amendment protection—a position clearly set forth by the relevant opinions of this Court in the past—then it is nevertheless clear that obscenity, like all other forms of speech, may properly, under given circumstances, be regulated—and indeed, prohibited—by the state. The given set of circumstances necessary to give rise to the right to prohibit depends, in the first instance, upon the test to be applied. Since this Court has always assumed that obscenity does not fall within the First Amendment, it has consistently avoided determination of the applicable test. *E.g., Ginsberg* v. *New York*, 390 U.S. 629, 641, n. 9. As we point out below, it seems that a "balancing test", and not a "clear and present danger" test, is particularly appropriate with respect to obscenity matters. Moreover, we point out that, in applying the balancing test, the interest of the state in safeguarding the public welfare and morality of its citizens far outweighs any countervailing interests which conceivably could be asserted by the commercial pornographer.

1. *The applicable test.*

As mentioned above, this Court has never determined what test should be applied with respect to obscenity matters, since it has always assumed that obscenity falls outside the protection of the First Amendment. With respect to other First Amendment considerations, however, two tests of general application have emerged from the varying opinions of this Court[11]—the "clear and present danger" test,[12] and the so-called "balancing" test.[13] Nothing in the varying opinions of this Court indicates when one

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[11] A possible third test, the so-called "absolute" test (see, Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 914-916 (1963)), has never been accepted by a majority of this Court. Some have suggested that a desire for "judicial convenience" justifies an absolutist approach. Judicial convenience has never been held by this Court to be a reason to avoid First Amendment considerations. This Court has, in the past, assumed the role of final arbiter dealing with First Amendment rights, and particularly the issue of the obscenity *vel non* of challenged material. See *Jacobellis v. Ohio*, 378 U.S. 184. We recognize that this burden necessarily casts each individual Justice into the unfamiliar and time-consuming role of super-psychiatrist [to assess the "prurient interest" aspect of the *Roth* test], super-demographer [to assess governing community standards], and super-literary expert [to assess the "social value" of the particular piece of work]. Judicial convenience is not a valid reason for casting aside state obscenity laws. Nor is it reasonable to afford obscenity absolute First Amendment protection solely for the sake of judicial convenience. See *People* v. *Bercowitz*, N.Y. Crim. Ct., New York City (38 U.S.L.W. 2510 March 6, 1970). Perhaps this Court could set new procedural guidelines to make the obscenity problem more compatible with our existing judicial structure. But sweeping the matter under the rug simply to avoid judicial disharmony and decision does not answer the problem—it simply postpones the matter to a later day.

[12] *Schenck* v. *United States*, 249 U.S. 47, 62; see also *Frohwerk* v. *United States*, 249 U.S. 204; *Debs* v. *United States*, 249 U.S. 211; *Abrams* v. *United States*, 250 U.S. 616; *Schaefer* v. *United States*, 251 U.S. 466; *Pierce* v. *United States*, 252 U.S. 239.

[13] *American Communications Association* v. *Douds*, 339 U.S. 382. See also the concurring opinions of Mr. Justice Frankfurter in *Dennis* v. *United States*, 341 U.S. 494, 517, and *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1. And for the suggestion that, beginning with *American Communications Association* v. *Douds*, *supra*, the "balancing of interests" formula has substantially supplanted the "clear and present danger" test, see Shapiro, *Freedom of Speech: The Supreme Court and Judicial Review* (1966), pp. 76-105.

test is preferred to the other. Therefore, starting afresh, it appears to us that the latter test is more appropriate in dealing with problems of obscenity, simply because the "clear and present danger" test assumes too much from too little. That test has almost methodically been applied to cases concerning political writings and utterances.[14] In that context, the test is a desirable one, since it assumes that political utterances—i.e., utterances urging the reform, abandonment, or change, of our existing political structures and institutions—are always valuable to a free and enlightened society. That assumption of course, is wholly consistent with the governing motivations underlying adoption of the First Amendment. That assumption does not, however, hold true when the test is removed from that context to the area of obscenity. A plurality opinion of this Court has already found that obscenity has no value, since it is "utterly without redeeming social value." *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418. Thus, the assumption that obscenity carries some social value—in our view, a *sine qua non* to the application of the "clear and present danger" test— is simply untenable. We therefore suggest that this Court should—assuming that it first finds that obscenity falls within the penumbra of rights guaranteed by the First Amendment—apply a balancing test in delimiting the scope and extent of governmental action in this area.

2. *The Public Interests Served by Restrictions on Commercial Distribution of Obscene and Pornographic Materials.*

Underlying legislative restrictions placed on the commercial distribution of obscenity and pornography is the assumption that it is inimical to the public welfare, and the further assumption that such material is detrimental

[14] See footnote 12, *supra*.

to public morality. We discuss these separate and distinct considerations below.

(a) *The Legislature Has Made a Reasonable Judgment that pornography and obscenity are inimical to the Public Welfare.*

One of the underlying assumptions to all obscenity legislation is that visual access to obscene and pornographic stimuli may induce crimes of violence or sexual crimes. In our view, that assumption is sufficiently substantiated so as to permit legislative action directed towards the end of prohibiting commercial distribution of obscenity and pornography.[15] We are aware, of course, of the studies of Cairns, Paul & Wishner,[16] and of Jahoda,[17] indicating the lack of reliable empirical evidence substantiating a basis for that assumption. We are also aware, however, of those reported studies and opinions—fully and fairly collected by Mr. Justice Clark [*Memoirs* v. *Massachusetts*,

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[15] We do not read this Court's opinion in *Stanley* v. *Georgia*, 394 U.S. 557, as having finally rejected that assumption. To be sure, this Court—referring to the studies of Cairns, Paul & Wishner [Cairns, Paul & Wishner, *Sex Censorship: The Assumptions of Anti-Obscenity Laws and the Empirical Evidence*, 46 Minn. L. Rev. 1009 (1962)], and Jahoda [Jahoda, *The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate* (1954)] — indicated that "[t]here appears to be little empirical basis for that assertion." But—as we read that opinion—that assumption that exposure to obscenity and pornography leads to crimes of sexual violence was rejected by this Court, not as *untrustworthy*, but as *irrelevant*, since this Court was of the opinion that, at least with respect to *private possession* of obscene material, less restrictive penal provisions, dealing directly with the sexual crimes themselves, could be drawn and enforced by the state. Different considerations, we suggest, should control with respect to commercial distribution.

[16] See footnote 15, above.

[17] See footnote 15, above. Dr. Johoda's research is fully summarized in Judge Frank's concurring opinion in *United States* v. *Roth*, 237 F.2d 796, 814-816 (C.A. 2).

383 U.S. 413, 451-453 (dissenting opinion)]—indicating that there may well be such a relationship between obscenity and crimes of violence or sexual crimes.

We do not point out these contrasting views in order to take sides. That is not the point. The critical question is, not who is right, but which body of government should first make that decision. In our view, at least in the first instance, the decision should not be made by this Court. Under our system of constitutional government, it has always been the function of the legislative body to collect the relevant facts, to sift the believable from the unbelievable, and to enact legislation on that basis. That traditionally has not been the function of the judicial branch of government.[18] To be sure, legislative determination of factual issues is not wholly impervious to judicial inquiry, and this Court has—on many occasions—pierced the legislative judgment on the ground that the judgment is totally devoid of any factual support. Such action by this Court is consistent with its traditional function of judicial review. But recognition of that basic principle does not suggest that its application is proper in the present case.

At the present time, the only safe statement which can be made is that the empirical evidence presently available is simply inconclusive. One sampling of behavioral studies indicates that a causal relationship does not exist, while another sampling of similar studies makes assertions to the contrary. Psychiatric studies in this area are nonexistent. In recognition of this grave uncertainty, Congress, in 1967, established the Commission on Obscenity

[18] This Court does not sit as a "superlegislature to weigh the wisdom of legislation." *Day-Brite Lighting Co., Inc.* v. *Missouri*, 342 U.S. 421, 423; *Ferguson* v. *Skrupa*, 372 U.S. 726, 728-733; *Burns Baking Co.* v. *Bryan*, 264 U.S. 504, 533-534 (dissenting opinion of Mr. Justice Brandeis, with whom Mr. Justice Holmes concurred). And see, particularly with respect to First Amendment considerations, *Tinker* v. *School District*, 37 U.S.L.W. 4121, 4125-4128 (dissenting opinion of Mr. Justice Black).

and Pornography. Public Law 90-100, 83 Stat. 253 (1967). One of the specific tasks assigned that Commission by Congress was—

> (3) to study the effect of obscenity and pornography on the public, and particularly minors, and its relationship to crime and other antisocial behavior;

Commission on Obscenity and Pornography, *Progress Report*, (July 1969), p. 1. The Commission itself, after preliminary analysis, has recognized the complete lack of controlling empirical evidence with respect to these vital questions. Id. at pp. 5-7.[19]

In these circumstances, it is premature for this Court to reject—without a full and fair hearing—one time-honored assumption that exposure to obscenity may induce substantive evils which the legislature concededly has the power to proscribe. The legislatures of 50 states—after viewing the evidence—have reasonably concluded that, at this juncture of time and learning, an ounce of prevention is preferred to a pound of cure. Future empirical developments may prove that assumption—or it may not. Legislators, however,—upon whom, after all, falls the burden of making decisions on a day to day basis—must act today, not tomorrow. They cannot share the luxury of the theoretician who can wait until all of the empirical evidence is developed and synthesized. They have today acted on the only evidence which is available, and have conscientiously determined that the risk is too great to be ignored. This Court should not—on the basis of the present evidence—cast that legislative judgment of every state aside.[20]

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[19] We understand that a final report of the Commission is due in July, 1970.

[20] Ala. Code, Tit. 14, §374(3); Alaska Statutes Title 11 Sec. 11.40.160; Arizona A.R.S., §13-531.01; Arkansas Stat. Ann., §41-

(b) *A state legislature, may, consistent with constitutional limitations, foster morality, and take affirmative steps discouraging and preventing immorality.*

If we are wrong in our position that the legislature, consistent with First Amendment considerations, could validly conclude that there is a causal relationship between the commercial distribution of obscenity and tangible evils with which the legislature concededly has the power to deal — e.g., crimes of violence or sex crimes — legislation prohibiting the commercial distribution of obscene material is nevertheless a valid incident of the police power left to the states. It has become fashionable as of late, in discussing the whole question of obscenity, to — after characterizing the empirical evidence as untrustworthy or nonexistent — conclude that the subject is really one of morality, and to simply dismiss it as that. Apparently sub-

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2729 (Repl. 1964); California Pen. C.A., §311, §311.2; Colorado CRS 1963, §40-9-17; Connecticut C.G.S.A., §53-243; Delaware 11 Del. C., §711; Florida F.S.A., §847.011; Georgia Code Ann., §26-6301; Hawaii Rev. St., Sec. 727-8; Idaho I.C., §18-4101; Illinois S.H.A. Ch. 38, §11-20; Indiana A.I.S., §10-2803; Iowa I.C.A., §725.3; Kansas Gen. St. 21-1102 et sep; Kentucky KRS, §436.101; Louisiana LSA-R.S. 4:301; Maine. 17 M.R.S.A., §2901; Maryland Art. 27, §417; Massachusetts M.G.L. 272, §28A; Michigan M.C.L.A., §750.343A, §750343B; Minnesota M.S.A., §617.243; Mississippi Sec. 2286, Code 1942; Missouri RSMO 563.280; Montana Sec. 94-3603, Revsd. Vol. 8, Revised Codes of Montana; Nebraska R.R.S. 1943, §28-1120; Nevada Rev. St. 201.250; New Hampshire RSA 571-A:1 (Supp); New Jersey N.J.S.A. 2A:115-1.1; New Mexico gives local government the option to enact such legislation. See New Mexico Rev. St. 14-17-12; New York Penal Law, §235.00; North Carolina G.S. 14-189.1; North Dakota N.D.C.C. 12-21-07; Ohio Section 2905.34 Revised Code; Oklahoma St. Ann. Title 21, §1040.13; Oregon Rev. St., §167.151; Pennsylvania Purdon's Pa. Stat. Ann. Title 18, §4524; Rhode Island Gen. Laws R.I., §11-31-1; South Carolina S.C. §16-414.1, §116-414-2; South Dakota S.D. compiled Laws 22-24-11, §2; Tennessee Code Ann., §39-3003; Texas Vernan's Texas Penal Code Art. 527; Utah Code Ann., §76-39-5; Vermont 13 V.S.A., §2801; Virginia Code 18.1.228 - 18.236.4; Washington RCWA, §9.68, 010; West Virginia Code, §61-8-11; Wisconsin Stat. Ann. 944.21; Wyoming Statutes 6-103, 6-104.

sumed in this approach is the socio-political theory that the state has no right to legislate with respect to purely moral judgments. The question before this Court, however, is not whether, as a socio-political or philosophical matter, the state should legislate in this area, but whether such legislation is consistent with the United States Constitution. In our view, just as the Constitution does not "... enact Mr. Herbert Spencer's Social Statics," *Lochner* v. *New York*, 198 U.S. 45, 75 (dissenting opinion of Mr. Justice Holmes), so it does not embrace Hugh Heffner's "Playboy Philosophy" that moral judgments with respect to matters of sex are beyond the reach of legislative determination and demarcation.

On the contrary, this Court has consistently ruled that moral judgments, consistent with applicable constitutional limitations, can and should be made by the state.[21] Thus, this Court, in interpreting the Constitution, has held that the state has the constitutional power to prohibit bigamy — indeed, even the advocacy of bigamy — because that relationship is inimical to our way of life and public morality. *Reynolds* v. *United States*, 98 U.S. 145; *Davis* v. *Beacon*, 133 U.S. 333, 342. This, in effect, involves a purely moral judgment on the part of the legislative branch. Other cases sustaining the use of the police power to foster morality and discourage or prohibit immorality are legion. Thus, it has been held that the state has the constitutional right to discourage or prohibit gambling in one form or another, *Stone* v. *Mississippi*, 101 U.S. 814; *New Orleans*

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[21] In this context, we use the word "state" as the equivalent of "government", be it federal, state, or local. We recognize, however, the distinctions drawn between federal and state power by individual Justices of this Court—especially with respect to the issue of obscenity. E.g., *Roth* v. *United States*, 354 U.S. 476, 496-498 (Mr. Justice Harlan, concurring in part and dissenting in part); *Memoirs* v. *Massachusetts*, 383 U.S. 413, 455 (Mr. Justice Harlan dissenting); *Carlos* v. *New York*, No. 524 O.T. 1969, 38 U.S.L.W. 3209 (opinion of The Chief Justice and Mr. Justice Harlan).

v. *Houston*, 119 U.S. 265; *Douglas* v. *Kentucky*, 168 U.S. 488; *Marvin* v. *Trout*, 199 U.S. 212; *Trading Stamp Cases*; *Rast* v. *Van Deman & Lewis*, 240 U.S. 342; *Tanner* v. *Little*, 240 U.S. 369; *Pitney* v. *Washington*, 240 U.S. 387; *Marchetti* v. *United States*, 390 U.S. 39, 44, 61.[22] The state has the power to prohibit or discourage the manufacture and distribution of intoxicating beverages, *License Cases*, 5 How. 504; *Bartemeyer* v. *Iowa*, 18 Wall. 129; *Beer Co.* v. *Massachusetts*, 97 U.S. 25; *Mugler* v. *Kansas*, 123 U.S. 623; *Crowley* v. *Christensen*, 137 U.S. 86; *Crane* v. *Campbell*, 245 U.S. 304; *Samuels* v. *McCurdy*, 267 U.S. 188; see also *Van Oster* v. *Kansas*, 272 U.S. 465; *Eiger* v. *Garrity*, 246 U.S. 97; *Purity Extract Co.* v. *Lynch*, 226 U.S. 192; the constitutional power to prohibit "futures" trading, *Booth* v. *Illinois*, 184 U.S. 425; to prohibit, except in certain specified cases, the maintenance of any billiard hall or pool room, *Murphy* v. *California*, 225 U.S. 623, 628-630; and to prohibit the transportation of females in interstate commerce for the purpose of prostitution or debauchery; *Hoke* v. *United States*, 227 U.S. 308; *Caminetti* v. *United States*, 242 U.S. 470. The above cases represent but a sampling of the many cases in which this Court has defined and recognized the right of the state to regulate in areas touching upon morality. Other morality judgments—particularly at the state and local level—are reflected in the various and numerous penal codes prohibiting fornication, sodomy as between consenting adults, and adultery. All told, it seems beyond dispute that the state may constitutionally legislate in areas touching public morality.

We re-emphasize that the question before this Court is

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[22] Some have attempted to explain that prohibition of gambling is a proper legislative purpose only because, as an economic fact of life, it affects those who are least able to absorb gambling losses, and thus affects society at large. This justification, however, is conveniently forgotten or ignored with respect to legislation dealing with pari-mutuel betting, state-run lotteries, and other forms of legal gambling.

not whether it is right or wrong to legislate with respect to purely moral questions.[23] The question is simply whether such legislation is consistent with the United States Constitution. In our view, any argument to the contrary has been repeatedly and decisively foreclosed by the decisions of this Court.

3. The valid legislative purpose of protecting the public welfare and public morality clearly outweighs any countervailing interest which could conceivably be asserted by those who commercially distribute obscene and pornographic material.

We have pointed out above that—as a question of constitutional power—state legislatures have the broad right, indeed, the solemn duty, to take reasonable steps towards protecting the public welfare and public morality. In accordance with this duty, the legislative bodies of the several states have rationally concluded that commercial distribution of obscenity and pornography could very well lead to crimes of violence or sexual crimes, and to a serious breakdown of the moral fabric so necessary to a just and ordered society. On the other hand—a plurality of this Court has already determined that obscenity and pornography may properly be defined as material which is "utterly without redeeming social value." *Memoirs v. Massachusetts*, 383 U.S. 413, 418.

[23] We deal here primarily with "legislative" action touching on purely moral issues. The legislative branch of government, however, is not the only branch which deals with purely moral decisions on a day to day basis. Every time a prosecutor decides not to prosecute an otherwise prosecutable crime because of some extenuating circumstances, he has made a moral judgment. Every time this and other Courts have made a determination of what constitutes "due process of law" or a "fair trial", moral considerations play a large role. And, indeed, in the present case, appellees bring their cause under the Fourteenth Amendment—itself a product of moral judgment made by the people through the amendment process.

In these circumstances, the result of any balancing of the competing interests is at once self-evident. Stripped to its bare essentials, the only interest which the commercial pornographer can realistically assert is his self-serving interest of making a profit from exploitation of filth for filth's sake—nothing more, nothing less. That interest, however, can hardly rise to a level paramount to the welfare and morality of the public at large. The First Amendment does not permit the commercial pornographer to reap his ill-gained profits at the expense of all. If future empirical developments show that commercial distribution of pornography is not detrimental to the public welfare, or that a breakdown in moral fabric presents no serious blow to the preservation of a just and ordered society, then let the commercial pornographer raise his voice to this Court at that time. Until that time, his plea should be made solely to the legislative forum which is entrusted with the solemn duty of safeguarding the public welfare and public morality of all citizens,[24] and which is the representative branch of government.[25]

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[24] Many have said that it is impossible to legislate morality—that a person who is determined to be immoral will be so despite legislation to the contrary. The validity of that observation is not entirely clear. Moreover, that observation is *irrelevant*. Removal of legislation prohibiting commercial dissemination of pornography—whether by legislative repeal or judicial decree—does more than simply remove the ban. It, in a sense, legitimizes the activity, and gives it a cloak of governmental approval and sanction. In fact, removal of the ban would, in our view, directly encourage it. Thus, although presence of the statute may not in fact bring a halt to all immorality, removal of that statute would foster immorality—in our view, the worse of the two evils.

[25] Mr. Justice Holmes cautioned us long ago: "The life of the law has not been logic: it has been experience." Holmes, *The Common Law*, (Mark DeWolfe Howe, Ed. 1963), p. 5. That entreaty is as valid today as it was when said.

We may be accused of begging the question by asserting the use of a "balancing" test, referring to this Court's definition of obscenity — i.e., material utterly without redeeming social value — and then concluding that the legislative purpose of safeguarding the public welfare and public morality, on balance, outweighs the interests asserted

D. *The Holding In* Roth v. United States, 354 U.S. 476, *That A State May, Consistent With First Amendment Considerations, Prohibit Commercial Distribution Of Obscene And Pornographic Material, Presents No Conflict With This Court's Subsequent Holding In* Stanley v. Georgia, 394 U.S. 557.

In our view, a holding by this Court that a state—in the interest of safeguarding public welfare and public morality—may prohibit commercial distribution and dissemination of obscenity and pornography presents no conflict with this Court's holding in *Stanley* v. *Georgia*, 394 U.S. 557. In that

by the commercial pornographer and those whom he purports to serve. But within the context of the decision-making process—whether it be within the legislative, judicial, or executive, branch of government—the decision maker should, as suggested by Mr. Justice Holmes, first look to *reason*, not *logic*. The logician's syllogism, although it provides for the quick and easy solution, does not necessarily provide for the just one. The logician would say that the self-incrimination clause of the Fifth Amendment does not extend beyond the courtroom. That is, after all, what that Amendment says—nothing more, nothing less. But common sense and common experience has taught us otherwise. Reason—which embodies the intangibles of common sense and common experience—has looked beyond the logician's inflexible rules and has demanded that the privilege against self-incrimination extend beyond the confines of the courtroom to the jailhouse (*Miranda* v. *Arizona*, 384 U.S. 436), and, indeed, to the home (*Orozco* v. *Texas*, 394 U.S. 324). So, we suggest, *reason*, not *logic*, compellingly points to the conclusion that the legislative purpose of protecting the public welfare and public morality transcends the interests of the commercial pornographer.

In any event, the argument which we advance is not a product of the parity of our pen, but of the quill of our Founding Fathers, and controlling precedent of this Court. History has recorded the noble purpose behind the First Amendment. As we read that relevant history—and as that relevant history has been interpreted by this Court—our Founding Fathers were rightfully concerned that ideas having social value, no matter how distasteful to the prevailing public opinion, should not be suppressed from the market place of ideas. Hence, the First Amendment. Application of the "clear and present danger" test to ideas utterly without redeeming social value does not advance the preferred freedoms safeguarded by the First Amendment—it simply denigrates the noble purpose behind that Amendment's adoption. Thus, the argument is not ours: it is that of history.

case, the Georgia statute under challenge (Ga. Code Ann. §26-6301 [Supp. 1968]) prohibited, under pain of penalty, private possession of material known to be obscene. This Court, in part pointing to complementary roles between the First and Fourth Amendments, reversed the conviction based upon that statute, holding that a state cannot constitutionally punish a person for private possession of obscene material within the privacy of his home.

That decision, however, presents no conflict with *Roth*. The thought that one should not be prosecuted for the contents of his library, and the material which he reads within the privacy of his home, is older than the Constitution itself. It first found expression in *Entick* v. *Carrington*, 19 How. St. Tr. 1029 (1765). Although that case involved a prosecution for seditious libel—the primary target of the First Amendment—its implications are broader. It recognized that a special right of privacy should attach to the contents of a man's library—the material which he persuses in the privacy of his home. Only the most compelling reasons—and, as recognized by this Court in *Stanley*, the desire of the state to prosecute for private possession of obscene material is not such a compelling reason—justifies governmental invasion of that sacrosanct right of privacy of the home.

As a question of Fourth Amendment law, the rationale underlying this special right of privacy has been universally accepted by this Court. It has usually found its expression in those cases condemning rummaging-type searches by police officers. E.g., *Go-Bart Importing Co.* v. *United States*, 282 U.S. 344; *United States* v. *Lefkowitz*, 285 U.S. 452; *Kremen* v. *United States*, 353 U.S. 346; *Chimel* v. *California*, 395 U.S. 752. Unlike other evidence, writings, films, and other effects which are the sum and substance of a man's library, cannot be effectively seized without some degree of rummaging. Because of their very

nature, books and films, and the contents thereof, cannot be specified with any degree of certainty before the search. Only after an examination of many papers and films—many of which a police officer or other governmental agent has no business to read—can the officer seize that which he originally intended. By the time he has found that which he had intended to seize, the officer may have learned of the political leanings of the person whose library he has searched, or of his romantic escapes of a time since past. No one would suggest that the state has a legitimate interest in prying into these secrets, and, in reality, the warrant is akin to the general warrant condemned by the Fourth Amendment.

It is this constitutional philosophy, we would suggest, which prompted this Court to rule as it did in *Stanley*. A statute which provides for punishment for possession of obscene material within the privacy of one's home necessarily invites and encourages rummaging through private libraries as a means of enforcement. This is the very evil, we would suggest, which prompted this Court to rule as it did in *Griswold* v. *Connecticut*, 381 U.S. 479. As the birth control statute there in issue invited governmental excursions into the privacies of the marital relationship—indeed, the marital bedroom—so a statute which forbids private possession of obscene material invites rummaging through one's library. Neither governmental invasion is consistent with our constitutional scheme, and neither should be invited or encouraged by legislation which necessarily, as a means of enforcement, invites that result.

It is clear, moreover, that this principle—and the concomitant rights which that principle vouchsafes—has no just application to legislation prohibiting commercial distribution of obscene and pornographic material. Such legislation does not flirt with the privacies of one's home or library—indeed, it is directed towards an enterprise which

is clearly public in nature. Enforcement of that legislation does not invite lawless invasions of the right to privacy secured by the Fourth Amendment. In these circumstances, nothing in *Stanley* v. *Georgia*, 394 U.S. 557, or the underlying rationale of that decision, prohibits the states from proscribing commercial distribution of obscene material which the several legislatures—in their wisdom—have concluded would be detrimental to the public welfare and public morality of the citizens which they serve.

II. The Majority of the Court Below Abused Its Discretion in Granting Injunctive Relief in the Circumstances of This Case.

A. *Introduction.*

As set forth in the Statement above, appellees, by way of their Complaint, sought to enjoin all future prosecutions in connection with the showing of the film, "I Am Curious (Yellow)," under the provisions of the Civil Rights Act (42 U.S.C. 1983), on the ground that the statute (Mass. Gen. Laws, ch. 272, §28A) was unconstitutional on its face in light of this Court's holding in *Stanley* v. *Georgia*, 394 U.S. 557.[26] By an amendment to their Complaint, appellees further sought a declaratory judgment under the provisions of 28 U.S.C. 2201, as to the constitutionality of that statute for the same reasons. In the court below, appellants argued that appellees did not make out a cause of action in equity

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[26] No question is presented here concerning application of the anti-injunction statute (28 U.S.C. 2283). In light of this Court's holding in *Dombrowski* v. *Pfister*, 380 U.S. 479, 484, all parties assumed that the statute was not applicable, since appellees, by filing their Complaint in the court below before return of the state court indictments, had won "the race to the forum of [their] choice * * *." *Dombrowski*, at 502 (dissenting opinion of Mr. Justice Harlan).

warranting the extreme measure of injunctive relief which they requested. Appellants further argued that—even if such injunctive relief was otherwise warranted under traditional notions of equity—the court should abstain pending resolution of the issues, and possible construction of that statute, by the Massachusetts Supreme Judicial Court.[27] A majority of the court below rejected both arguments. The majority found that irreparable injury would befall appellees in the absence of immediate injunctive relief, and that the doctrine of abstention was not applicable. Judge Julian, dissenting from that opinion, found the record devoid of any evidence supporting a finding of irreparable injury. He further pointed out that abstention would have been most appropriate in the circumstances.

In our view, the majority below erred in concluding that special circumstances existed which warranted the issuance of the drastic remedy of an injunction enjoining good-faith prosecutions brought by a state law enforcement officer charged to enforce state law. We point out below that the record is conspicuously bare of evidence showing irreparable injury—in our view, a *sine qua non* to the granting of injunctive relief by a federal court in the circumstances of this case. We further point out that abstention was most appropriate in the circumstances of this case.

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[27] In their Motion to Affirm (p. 16, n. 9), appellees suggest that the Massachusetts Supreme Judicial Court has already *impliedly* rejected the *Stanley* rationale, since the *Stanley* argument was brought to the attention of that Court during oral argument. That suggestion, however, is contrary to established fact. In the court below, counsel for appellees specifically represented that the *Stanley* argument was *not* brought to the attention of the Massachusetts Supreme Judicial Court. (See November 21, 1969 Hearing Transcript, at pages 12-13, on file with the Clerk of this Court as an exhibit).

B. *The Record Fails To Support The Finding Of Irreparable Injury Which, On Balance, Warranted The Issuance Of The Drastic Remedy Of Injunction Which Enjoined Good-Faith Enforcement Of State Criminal Laws.*

In *Douglas* v. *City of Jeanette*, 319 U.S. 157, this Court cautioned that, consistent with well-established and deeply-rooted concepts of comity and federalism, a federal court should be extremely reluctant in granting injunctive relief which would have the effect of enjoining good-faith enforcement of state criminal laws by state law enforcement authorities charged with the duty of enforcement; that such relief should be granted only upon the most compelling showing of irreparable injury which, on balance, was paramount to the entire constitutional concept of federalism. That rule of law—judge-made in the first instance, but which has found expression in Congressional legislation[28]—is as applicable today as it was in 1943. *Dombrowski* v. *Pfister*, 380 U.S. 479, 483-485; *Zwickler* v. *Koota*, 389 U.S. 241, 253; *Cameron* v. *Johnson*, 390 U.S. 611, 618. The Court in *Douglas* further held that the injury "incidental to every criminal proceeding brought lawfully in good faith" was not—standing alone—sufficient to make out a showing of irreparable injury. *Douglas*, at 164.[29]

In *Dombrowski* v. *Pfister*, 380 U.S. 479, this Court indeed found "special circumstances"—i.e., irreparable injury—which warranted departure from the *Douglas* rule. In that case, the appellants alleged that they were threatened with

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[28] E.g., 28 U.S.C. 2281, 2283.

[29] See also, *Cameron*, *supra* at 618:

> Federal interference with a State's good-faith administration of its criminal laws "is peculiarly inconsistent with our federal framework" and a showing of "special circumstances" beyond the injury incidental to every proceeding brought lawfully and in good faith is requisite to a finding of irreparable injury sufficient to justify the extraordinary remedy of an injunction.

prosecution "under statutes allegedly overbroad and seriously inhibiting the exercise of protected freedoms" (380 U.S. at 489), and which could not — without risk of criminal prosecution — be challenged because of rigid standing requirements; that the appellees repeatedly announced that the appellant organization — in fact a civil rights organization — was a Communist-front organization (380 U.S. at 488); that appellees — during the course of a search which was subsequently found to be unlawful — "ransacked" the files and records of the organization (380 U.S. at 487-488); that potential members of, and contributors to, the organization were frightened off by the conduct of the appellees (380 U.S. at 488); and that there was no possibility of resolution of the constitutional issues raised by the Complaint in the state courts, since appellants were threatened with prosecution under statutes different from that under which they had been indicted (380 U.S. at 489).

In the present case, appellees have neither alleged nor made any showing that they had to risk prosecution to challenge the facial validity of Mass. Gen. Laws, ch. 272, 28A. Indeed — to the contrary — the Massachusetts Supreme Judicial Court has affirmatively invited such challenges to be made under the civil provisions of the Declaratory Judgment Act (Mass. Gen. Laws, ch. 231A). *Commonwealth v. Baird*, 1969 Mass. Adv. Sh. 727, 735, 247 N.E.2d 574, 580 (1969), certiorari denied, No. 707 Misc., O.T. 1969 (38 U.S.L.W. 3255). Moreover, appellees have neither alleged nor shown the wholesale misconduct and bad faith as detailed in the *Dombrowski* Complaint. Finally, appellees neither alleged nor showed — nor could they do so — that the issue which they requested the lower court to resolve could not have been resolved in one single judicial proceeding in the state courts.

Thus, in our view, a fair reading shows that the Complaint filed in this case is possibly similar to that filed in

Dombrowski only to the extent that, in both, a challenge was made to the overbreadth of the statute. But even in that regard, the allegations are clearly distinguishable. In *Dombrowski*, the statutes under attack—the Subversive Activities and Communist Control Law (La. Rev. Stat. §§ 14:358—14:374 [Cum. Supp. 1962]), and the Communist Propaganda Control Law (La. Rev. Stat. §§ 14:390-14:390.8 [Cum. Supp. 1962])—were clearly unconstitutional on their face under prior holdings of this Court if enforced as written. Cf. *Dennis* v. *United States*, 341 U.S. 494; *Yates* v. *United States*, 354 U.S. 298.[30] As later explained by this Court, the statutes under attack in *Dombrowski* were statutes which "were *patently* unconstitutional on their face . . . ." *Cameron* v. *Johnson*, 390 U.S. 611, 619 (Emphasis added).

This we regard to be the controlling distinction between *Dombrowski* and the present case. It is clear that—whatever else may be said—the Massachusetts obscenity statute (Mass. Gen. Laws, ch. 272, § 28A) is not *patently* unconstitutional on its face. Until this Court's decision in *Stanley*, no one seriously questioned the facial validity of that statute, or the accepted proposition that a state could properly prohibit commercial distribution of pornography. Even after *Stanley*, we are unaware of any court decision holding that a statute prohibiting commercial distribution of pornography is *patently* unconstitutional on its face.[31]

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[30] For example, Section 364(4) of the Subversive Activities and Communist Control Law made it a felony to contribute to a "subversive organization." Section 359(5) defined a "subversive organization" as one which, *inter alia*, *advocated* activities intended to overthrow the government. No distinction was made between "mere abstract advocacy" and "advocacy to action by language calculated to incite"—as required by the *Dennis* and *Yates* rationale.

[31] Significantly, this Court has never applied a facial invalidity test to statutes prohibiting commercial distribution of pornography, but has chosen to use an "as applied" test. If statutes relating to commercial distribution of pornography are *patently* unconstitutional, then

This is clearly understandable in view of this Court's specific reference to *Roth* in the *Stanley* decision, and the assertion that the former opinion retains its vitality in spite of the latter. Even the court below could not conclude that the statute was *patently* unconstitutional on its face. One judge dissented from the majority opinion. Moreover, even the majority recognized the uncertainly of the thrust of *Stanley*, stating "* * * that this is a decision of *probability*, not a *final holding* that that the Massachusetts statute is unconstitutional." (App. 36) (Emphasis added). In these circumstances, it can hardly be argued that the Massachusetts obscenity statute is *patently* unconstitutional on its face, or that the challenge to that statute is at all similar to that in *Dombrowski*.

In addition to the fact that appellees challenged the statute as overly broad, a majority of the court below found an alleged monetary loss and "chilling effect" as substantiating a showing of irreparable injury. In our view, neither factor—considered singly or collectively—warrants that conclusion.

Specifically, with respect to the alleged monetary loss, the majority state (App. 35-36):

> Even if money damages could be thought in some cases adequate compensation for delay, this defendant would presumably be immune. We agree with plaintiffs that the box office receipts, if there is a substantial delay, can be expected to be smaller. A moving picture may well be a diminishing asset. (Footnote omitted).

That finding, however, finds no support whatsoever in the record below. As the dissenting opinion aptly points out,

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there was opportunity for this Court to have said so with respect to a related Massachusetts statute (Mass. Gen. Laws, ch. 272, §28B). See *Memoirs* v. *Massachusetts*, 383 U.S. 413. This Court instead chose to apply an "as applied" test. Even more significantly, in *Stanley*, the precurser of the present case, this Court apparently chose to apply an "as applied" test instead of a "facial validity" test.

"[t]here has been no showing of the extent of the monetary loss, if any, that [appellees] will suffer if they are not allowed to show the film." (App. 42). In our view—contrary to the fleeting suggestion of appellees (Motion to Affirm, pp. 20-21), and the apparent assumption of the majority below—the fact that box office receipts would be irretrievably lost absent injunctive relief is not a matter of common and general knowledge. There is not an iota of evidence showing that appellees could not have leased another film and still have maintained box office receipts in the same proportion and amount as gained through the showing of the film, "I Am Curious (Yellow)". Indeed, there was not even an allegation in the Complaint that appellees had made an effort to minimize further losses. Moreover, as the dissenting judge further correctly pointed out, characterization of the film as a diminishing asset added nothing to appellees' case. The film itself was owned by Grove Press, Inc.—which was not a party to the action—and not by appellees. And—again—the record was simply bare of any evidence tending to establish the value of the film.

The majority further held that the "chilling effect" upon others was relevant to a determination of irreparable injury. As has been noted by Mr. Justice Harlan, however, the "chilling effect" doctrine is an "ubiquitous and slippery" one. *Zwickler* v. *Koota*, 389 U.S. 241, 256, n. 2 (concurring opinion). Its relevance to the present case is extremely doubtful. The court below assumed that the film itself was obscene—i.e., "utterly without redeeming social value." *Memoirs* v. *Massachusetts*, 383 U.S. 413, 418. Thus, we find it extremely difficult to conclude that—by denying prospective patrons an opportunity to view a film which is utterly without redeeming social value, indeed, a film having no First Amendment protection—the statute operates as a "chilling effect."

In short, appellees completely failed in making a showing of irreparable injury, and thus fell far short of making out a cause of action in equity warranting the extraordinary remedy of injunction against a state law enforcement officer administering the state law in good faith. The majority below therefore abused its discretion in granting injunctive relief. *Douglas, supra.*

C. In The Circumstances Of This Case, The Court Below Should Have Abstained From Passing On The Facial Validity Of Mass. Gen. Laws, ch. 272, §28A, Until That Statute Was Passed Upon By The Massachusetts Supreme Judicial Court.

In any event—even if the appellees made out a cause of action in equity otherwise warranting the issuance of injunctive relief—the court should have abstained until the matter was passed upon by the Massachusetts Supreme Judicial Court.[32] This Court has repeatedly indicated that abstention is appropriate where litigation in the state court would avoid an unnecessary decision by the federal court of a serious constitutional question, or where it would present the constitutional question in a completely different posture. *Harrison* v. *NAACP*, 360 U.S. 167; *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185, 188-189; *Zwickler* v. *Koota*, 389 U.S. 241, 251, n. 14, and 389 U.S. at 255-256 (concurring opinion of Mr. Justice Harlan). This is especially true where a challenged statute is fairly susceptible to construction which would readily eliminate the constitutional objection. *Id.* As noted above, appellees made a broadside challenge to the facial validity of Mass. Gen. Laws, ch. 272, §28A. In view of the nature of the challenge, appellants moved the court below to abstain pending further proceedings—and possible construction of

[32] See footnote 27, *supra.*

the statute—in the state courts. A majority of the court below ruled that the abstention doctrine was not applicable in the circumstances of the case.

In our view, the majority below abused its discretion in denying the motion to abstain. In the posture of the case as presented to the court below—i.e., challenging the facial validity of the statute—the court was obligated to either condemn the entire statute as written [and previously construed by the Massachusetts Supreme Judicial Court], or to approve it. The nature of the challenge left no room for a middle ground approaching, since that court was obviously without judicial power to construe the state statute. It could not—as could the state court—judicially carve the statute in order, assuming that the *Stanley* rationale reaches as far as intimated by the court below, to separate the good from the bad.

The present statute under challenge (Mass. Gen. Laws, ch. 272, §28A) is fairly susceptible to construction which would make it consistent with First Amendment considerations—again assuming that *Stanley* is applicable to commercial distribution of pornography. The majority of the court below concluded that prosecution under the statute would be consistent with First Amendment limitations if the distributor or exhibitor "pandered" his wares.[33] Clearly, it would do no violence to the statute to construe it as being applicable to cases in which an element of pandering was present. It is clear that the legislature did not intend to forfeit the right to prosecute commercial distribution of pornography in a pandering context if there could be no prosecution against commercial distribution in a non-pandering context. Moreover, this Court, as did the court below, has held that commercial distribution of pornography in a manner which exposes an unwilling person to it can be prosecuted consistent with First Amendment

[33] But see footnote 4, *supra*.

limitations. See *Redrup* v. *New York*, 386 U.S. 767. Again it is clear that the legislature did not intend to forfeit the right to prosecute such "offensive" distributions, even if there could be no prosecution for non-offensive or non-pandering distributions, and thus, the Massachusetts Supreme Judicial Court could have construed the statute in conformity with this clear legislative intent.

The Massachusetts Supreme Judicial Court has not, in the past, shown its reluctance to construe that statute in order to meet constitutional mandate. Thus, following this Court's decision in *Smith* v. *California*, 361 U.S. 147, the Massachusetts Supreme Judicial Court construed the statute as requiring *scienter* so as to avoid future constitutional conflict. See *Demetropolis* v. *Commonwealth*, 342 Mass. 658, 175 N.E.2d 259. On other similar occasions, the Massachusetts Supreme Judicial Court has striven to narrowly construe statutes to save its constitutionality in the face of emerging First Amendment doctrine. Thus, in *Alegata* v. *Commonwealth*, 353 Mass. 287, 302-304, a challenge was made to the constitutionality of the "disorderly conduct" statute (Mass. Gen. Laws, ch. 272, §53). There the court narrowly construed the statute so as to eliminate any First Amendment objection. And, in so construing that statute, the court gave it the same meaning as given to the concept of "disorderly conduct" by Section 250.2 of the Model Penal Code (Proposed Official Draft), even though that definition obviously was not available to the legislature when the statute was originally enacted in 1943. Moreover, in *Commonwealth* v. *Baird*, 1969 Mass. Adv. Sh. 727, 247 N.E.2d 574 (1969), certiorari denied, 38 U.S.L.W. 3255, the Massachusetts Supreme Judicial Court construed a statute (Mass. Gen. Laws, ch. 272, §21) prohibiting the exhibition of contraceptive devices as not prohibiting exhibition which is in any manner connected with a speech

—again in an obvious attempt to make that statute conform with emerging constitutional doctrine.

In short, the statute under attack in the present case is one which is fairly susceptible to constitutional construction, and the Massachusetts Supreme Judicial Court has always assumed its rightful role of construing state statutes consistent with First Amendment considerations. Abstention was therefore appropriate. *Harrison* v. *NAACP, supra; County of Allegheny* v. *Frank Mashuda Co., supra.*

Nothing in this Court's decisions in *Zwickler* v. *Koota,* 389 U.S. 241 [upon which the majority of the court below relied (App. 36)], or *Dombrowski* v. *Pfister,* 380 U.S. 479, is to the contrary. In *Zwickler,* it was conceded by all parties that the statute under challenge simply was not susceptible to further construction by the state courts (389 U.S. at 250). Cf. *Aptheker* v. *Secretary of State,* 378 U.S. 500. *Dombrowski* is likewise inapposite. In that case, the appellants alleged that the appellees threatened to prosecute them in bad faith "without any hope of ultimate success, but only to discourage appellants' civil rights activities." (380 U.S. at 490). In the present case, appellees never challenged the good faith of appellant Garrett H. Byrne; indeed, in view of the conflicting opinions concerning the obscenity *vel non* of the motion picture, "I Am Curious (Yellow)", appellant's good faith cannot be gainsaid. Likewise in *Dombrowski,* this Court found that the statutes there challenged could not be construed by the state courts in a single proceeding (380 U.S. 491). In the present case, the issues which appellees raised in the court below could be fully and readily resolved on their appeal from the convictions in the Massachusetts Superior Court. Indeed, those issues could have been fully resolved in a single *civil* proceeding had they accepted the clear invitation of the Massachusetts Supreme Judicial Court and sought a declaratory judgment pursuant to the provisions

of Mass. Gen. Laws, ch. 231A. See *Commonwealth* v. *Baird*, 1969 Mass. Adv. Sh. 727, 735, 247 N.E.2d 574, 580 (1969), certiorari denied, 38 U.S.L.W. 3255. Finally, in *Dombrowski*, the appellants challenged as overbroad a series of statutes which this Court later explained were *patently* unconstitutional on their face. See *Cameron* v. *Johnson*, 390 U.S. 611, 619. As has been more fully pointed out above, pp. 33-34, it is clear that the statute here under challenge cannot be fairly characterized as *patently* unconstitutional on its face. Thus, nothing in the controlling decisions of this Court precluded application of the abstention doctrine, and the majority of the court below abused its discretion in denying the motion to abstain.

Conclusion

For the reasons stated above, it is respectfully submitted that the judgment below should be reversed.

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